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Prometheus Unbound: Fiduciary Obligation in the Supreme Court of Canada

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I. INTRODUCTION

In an increasingly interdependent world, or so it is argued, increased importance is placed on the law of fiduciary obligation.[1] The Canadian evidence, certainly, is consistent with this thesis. In recent years, two Canadian textbooks on fiduciary law have been published,[2] the latter of which currently cites something in the order of seven or eight hundred reported Canadian judicial decisions. Law review articles on the subject abound and at least one law school[3] offers a course on the subject. This paper attempts, in rather brief

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[1] T. Frankel, "Fiduciary Law" (1983), 71 Cal. L. Rev. 795.

[2] J.C. Shepherd, *The Law of Fiduciaries* (Toronto, Carswell, 1981); M.V. Ellis, *Fiduciary Duties in Canada* (Toronto, Carswell, 1988 with looseleaf supplements). The Australian experience is similar. See P.D. Finn, *Fiduciary Obligations* (Sydney, Law Book Co., 1977); J. Glover, *Commercial Equity: Fiduciary Relationships* (Sydney, Butterworths, 1995).

[3] The University of Alberta. An American casebook focusing on fiduciary doctrine provides teaching materials for a similar course. See D. DeMott, *Fiduciary Obligation: Agency and Partnership* (St. Paul, Minn., West Pub. Co., 1991).

compass, to develop an understanding and assessment of the present and possible future course of the recent jurisprudence of the Supreme Court of Canada on fiduciary law.

It will be useful to begin with a brief sketch of the traditional law of fiduciary obligation, as it might have been articulated by a Canadian lawyer in the common law tradition, *circa* 1975. The law of fiduciary obligation, it would be said, is an invention of the English courts of equity which imposes certain duties of loyalty on individuals who have undertaken, either expressly or impliedly, to act on another's behalf. The fiduciary duty of loyalty, which developed by analogy from principles of the law of trust which impose similar duties on express trustees, is imposed on individuals in a recognized list of categories of relationships such as principal and agent, solicitor and client, executor or administrator and beneficiary, director or officer and the corporation, promoter and investor, partners, joint venturers, doctor and patient and parent and child. Fiduciary relationships may also arise in relationships that do not come within the prescribed list, provided that, on its facts, the particular relationship possesses the requisite fiduciary character.

The nature of the duty imposed on individuals who owe a fiduciary obligation is normally expressed in two rules or proscriptions, the "profit" rule (to the effect that one who occupies a fiduciary position must not personally profit by virtue of that position) and the "conflict" rule (to the effect that one must not place oneself in a situation where duty to the principal is or may be seen to be in conflict with the self-interest of the fiduciary). In other words, one must not make a secret profit by virtue of one's fiduciary position and one must not engage in self-dealing. "Examination of the activities of fiduciaries involves, above all, an inquiry into the propriety of profit-making".[4] Various types of impropriety are spelled out in the fiduciary case law. The fiduciary must not accept a bribe or secret commission, sell his own property without disclosure of his interest to the principal, and so on. The duty of fiduciary loyalty thus enjoins a particular kind of exploitation or profiteering.

It is worth emphasizing, in the present context, that there are limits to the reach of the traditional fiduciary duty of loyalty. The scope of a particular fiduciary duty will be determined, typically, by examining the nature of the fiduciary undertaking. If acting

[4] E.J. Weinrib, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1 at p. 2.

outside the scope of that undertaking, the fiduciary is entitled to act in a self-interested fashion.[5] The fiduciary may, of course, be subject to other kinds of duties. Fiduciaries will often have a contractual relationship with their principal. The duties imposed by the contract would not necessarily or, indeed, normally be fiduciary in character. Fiduciary duty and contractual duty may overlap, however, where the agreement itself imposes a duty of loyalty. Fiduciaries are subject to the law of tort. Some types of fiduciary breach may be tortious. As a general proposition, however, the fiduciary's duty of loyalty is different in kind from the duties imposed by contract and tort. Thus, "not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty".[6]

In the event of a breach of duty, the remedies available to the victim of the breach have, as their evident purpose, the lifting of the fiduciary's ill-gotten gains. The faithless fiduciary may be forced to disgorge profits secured by breach either by the imposition of a constructive trust on those profits or by the remedy of an accounting. The principal distinction between the two remedies is that the accounting of profits remedy is merely personal in nature, whereas the constructive trust may confer proprietary relief by determining that the defendant holds certain assets secured by the breach as a constructive trustee on the plaintiff's behalf. Where the self-dealing involves the transfer of an asset to or from the principal, disgorgement of the ill-gotten gain may be achieved by a decree of rescission.

Under the traditional account, then, there is an evident symmetry as one moves from the nature of the duty — loyalty — through the definition of breach — profiteering and self-dealing — and on to the remedy — disgorgement of the profits. Our mid-70s lawyer might not have mentioned that in addition to the foregoing, the 1914 decision of the House of Lords in *Nocton v. Ashburton*

[5] See, generally, P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (Aurora, Ont., Canada Law Book, 1990), pp. 588-91. And see *McLeod v. Sweezey*, [1944] S.C.R. 111, [1944] 2 D.L.R. 145; *Tombill Gold Mines (Ltd.) v. Hamilton (City)*, [1956] S.C.R. 858, 5 D.L.R. (2d) 561.

[6] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at p. 647, 61 D.L.R. (4th) 14, *per* La Forest J. In *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 at p. 362, Southin J. emphasized this point in distinguishing the solicitor's duty to exercise reasonable skill and care from the duty of loyalty. This passage was quoted approvingly by both Sopinka and La Forest JJ. in their opinions in the *Lac Minerals* case, at pp. 597-98 and 647, respectively.

(Lord)[7] indicated that damages in the form of equitable compensation could be awarded where careless non-disclosure of a conflict caused economic loss. *Nocton* had been overtaken by developments in tort and, in any event, such facts would typically constitute, as they did in that case, a breach of contract.

II. PROMETHEUS

In December of 1994, the Supreme Court of Canada released its decision in *Hodgkinson v. Simms*,[8] the latest in a remarkable series of decisions rendered in the last decade or so in which the Supreme Court of Canada has devoted considerable attention to the elaboration and development of the law of fiduciary obligations. In *Hodgkinson*, the plaintiff was a stockbroker who had invested some portion of his very substantial earnings in real estate investments in the form of "MURBS". The crash of the real estate market saddled Hodgkinson with losses in the amount of $350,507.62. Unlucky in his decision to invest in real estate, Hodgkinson was much luckier when he retained counsel. His lawyer had the wit to recommend a claim against Simms, an accountant who was in the business of providing tax shelter advice and who had recommended to the plaintiff the particular MURB projects in which he had duly invested. The theory of the claim was that Simms had breached his fiduciary duty and thus would be obliged to indemnify Hodgkinson for all losses he had sustained. The factual foundations for the claimed breach of fiduciary obligation were that Hodgkinson, who had sought Simms' advice in the expectation that it would be independently given, was unaware of the fact that Simms had a professional relationship with the developers of the "MURB" projects in which he encouraged Hodgkinson to invest. Indeed, Simms' relationship was such that he enjoyed a "bonus billing" from the developers every time one of his tax planning clients invested in one of these projects. On the plaintiff's theory, then, Simms was caught in a classic breach of fiduciary duty, profiting from a situation in which there was a conflict between his self-interest and his duty to his client. Hodgkinson was not content to seek a disgorgement of those profits, however, but sought, in addition, indemnification for his losses on the basis that he would have not invested in the "MURBS" if he had known of Simms' involvement with the developers. A majority of

7 [1914] A.C. 932.
8 [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161.

the Supreme Court of Canada agreed with this analysis and awarded full indemnification of his losses.

In the reasoning of the members of the court in *Hodgkinson v. Simms* there are a number of characteristics which are typical of other decisions in this recent line of authority. First, much attention was devoted in the opinions to the question of fashioning the appropriate definition for the concept of "fiduciary relationship". Writing in 1975, Professor Weinrib observed that the judicial decisions in this field failed to provide an "elucidation of the broader problems of policy which underline the whole fiduciary concept" and, more particularly, failed to answer such questions as "[w]hat is the criterion of the fiduciary?"[9] Professor Weinrib was not being critical of the efforts of the judiciary for, as he noted, "it would be unrealistic to expect in the hurly-burly of judicial activity elaborately abstract comments about underlying purposes".[10] However unrealistic such expectations might have seemed in 1975, it is unquestionably the case that they have been richly fulfilled in this line of cases. The members of the court have, in fact, conducted a spirited debate on such questions in these authorities and the debate continues in the opinions in *Hodgkinson* itself.

Further, as with the earlier cases, the court in *Hodgkinson* was divided with respect to the question of whether the fiduciary criterion was met on the facts of the case at hand. In *Guerin v. Canada*,[11] a majority of the court held that officials in the Indian Affairs Branch of the federal government who had negotiated, on behalf of the plaintiff Indian band, a lease of a portion of the band's reserve lands to a golf club had breached a fiduciary obligation. They had failed to follow the band's instructions and negotiated the lease with less favourable terms than those on which the band had insisted. In *Frame v. Smith*,[12] the court divided on the question of whether a former wife who was granted custody of the children of the marriage owed a fiduciary obligation to the husband to facilitate access to the children. Although a majority of the court held that the statutorily authorized access order did not give rise to a fiduciary relationship, we shall see that the dissenting opinion of Wilson J. to the contrary effect has proven to be influential in matters of principle.

9 *Supra*, footnote 4, at p. 1.
10 *Ibid.*, at p. 2.
11 [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321.
12 [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81.

In the decision in *Lac Minerals*,[13] the court divided over the applicability of the fiduciary concept to parties who had entered into a series of negotiations which were thought to be leading towards a joint venture of a mining property, during which some confidential information was disclosed to and exploited by the defendant. In *Lac*, the majority opinion written by Sopinka J. held that the relationship was not fiduciary in the circumstances over a vigorous dissent to the contrary effect on this point written by La Forest J. These roles appear to have been reversed, to some extent, in *Hodgkinson v. Simms*.

A third feature of these decisions which is also manifest in *Hodgkinson* is the willingness on the court's part to develop and extend the notion that a defendant who has breached a fiduciary duty may be vulnerable not only to the traditional remedies of an accounting or a constructive trust, but, either additionally or alternatively, to an order to pay what are, in effect, damages for breach of fiduciary duty. Such damages, referred to as "equitable compensation"[14] are to be calculated on the basis of equitable principles which yield awards that might appear most impressive to a humble common lawyer. In *Guerin*, for example, the plaintiff band was awarded 10 million dollars in damages on the theory that equitable damages are "to be determined by analogy with the principles of trust law". The band was therefore entitled to the benefit of a presumption that, but for the fiduciary breach, it would have developed the land in the most advantageous way possible, that is by leasing the land for residential purposes at the height of the market during the period in question. In *Canson Enterprises Ltd. v. Boughton & Co.*,[15] the court debated vigorously, if somewhat inconclusively, whether other principles of trust law might be applicable to the calculation of damages for breach of fiduciary duty at the expense of such common law inventions as the doctrines of foreseeability, mitigation, contributory negligence and the like. Fortunately for the defendant solicitor in that case, the court was unanimously of the view that even in equity, a defendant would not be liable for damage which had no causal link to the fiduciary breach. The defendant solicitor had breached a fiduciary duty to his client, the purchaser of a real estate parcel, by failing to disclose that the

13 *Supra*, footnote 6.

14 See generally, I.E. Davidson, "The Equitable Remedy of Compensation" (1982), 13 Melb. U. Rev. 349; W.M.C. Gummow, "Compensation for Breach of Fiduciary Duty" in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto, Carswell, 1989), p. 57.

15 [1991] 3 S.C.R. 534, 85 D.L.R. (4th) 129.

property was being flipped by the vendor to an undisclosed third party. He was held not liable, however, for the damages that resulted when a warehouse built on the parcel by the plaintiff sank into the ground as a result of defective work by the plaintiff's soils engineers and contractor. There was no causal connection between the loss and the solicitor's breach of duty.

A fourth aspect of this line of authority, which is not present in *Hodgkinson*, is that the court has, on a number of occasions, developed new types of duties to be imposed on fiduciaries or, one might say, new types of breach of fiduciary obligation. In the *Guerin* case, for example, the failure of the Indian Affairs officials to follow the band's instructions was held to be a breach of fiduciary loyalty.[16] Neither the officials nor the government were said to be in a conflict situation or inappropriately profiting from the transaction. If the Crown had simply been acting for the band as an agent on a contractual basis — and it is perhaps important in explaining the approach taken in *Guerin* that this was not so — it seems rather likely that the breach in question would be characterized as a simple breach of contract sounding in contractual damages. In contract, of course, the quantum of damages would doubtless be substantially less than the 10 million dollars awarded in *Guerin*. *Guerin* suggests, then, that a fiduciary who fails to follow instructions and thereby deprives the principal of an opportunity to profit may be liable to compensate for that loss of profit on equitable terms.

The defendant solicitor in *Canson v. Boughton*, in failing to disclose to the client purchaser the fact that the property to be purchased would be flipped, was neither in breach of the conflict rule nor of the profit rule. Rather, he had engaged in a material non-disclosure of information which if disclosed, would have led his client to refuse to go through with the transaction, thus avoiding substantial losses. In writing for the majority, La Forest J. noted that "[s]ome academic writings, it is true, argue for limiting fiduciary obligations to situations where the solicitor may benefit from a misstatement".[17] Such views, for La Forest J. "may to some extent rest on, in my view, a misguided sense of orderliness".[18]

16 *Supra*, footnote 11.

17 *Supra*, footnote 15, at p. 573.

18 *Ibid.*, referring to the paper of the Honourable Mr. Justice Gummow referred to at footnote 14, *supra*. See also, in the same volume, P. Finn, "The Fiduciary Principle" at p. 1 and especially at pp. 28-30.

Two decisions of the court lead to the conclusion, which some may find surprising, that a sexual assault constitutes a breach of fiduciary duty. In the first, *Norberg v. Wynrib*,[19] a majority of the court concluded that a physician who had traded prescriptions for a drug to which his plaintiff client was addicted in exchange for sexual favours had committed a battery and was liable for both general and punitive damages in tort. In a concurring opinion, McLachlin J. indicated that "the doctrines of tort or contract [do not] capture the essential nature of the wrong done to the plaintiff."[20] Rather, in her view, "[o]nly the principles applicable to fiduciary relationships and their breach encompass it in its totality".[21] The physician was under a fiduciary duty to act in the patient's best interest and "not permit any conflict between his duty to act only in her best interests and his own interests — including his interest in sexual gratification".[22] McLachlin J. acknowledged that the interests of the plaintiff being protected by this application of fiduciary theory were "different from the legal and economic interests which the law of fiduciary relationships has traditionally been used to safeguard".[23] Nonetheless, as Wilson J. observed in *Frame v. Smith*,[24] "[t]o deny relief because of the nature of the interest involved, to afford protection to material interests but not to human or personal interests would, it seems to me, be arbitrary in the extreme". McLachlin J. would have awarded damages on a somewhat higher scale than the majority. In the second case, *M. (K.) v. M. (H.)*,[25] a majority of the court adopted the view that incest committed by the defendant father constituted both the tort of assault and a breach of the fiduciary relationship between parent and child. In these two cases, we may note in passing, the court pioneered the notion of punitive damages in equity.[26]

19 [1992] 2 S.C.R. 226, 92 D.L.R. (4th) 229. For comment, see T. Allen, "Civil Liability for Sexual Exploitation in Professional Relationships" (1996), 59 Mod. L. Rev. 56.

20 *Ibid.*, at pp. 268-69.

21 *Ibid.*, at p. 269.

22 *Ibid.*, at p. 275.

23 *Ibid.*, at p. 277.

24 *Supra*, footnote 12, at p. 143.

25 [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289.

26 It is not entirely clear that the court was aware of the controversial nature of this proposition. Though there are authorities in either direction, the Ontario Law Reform Commission in its *Report on Exemplary Damages* (Toronto, 1991) at pp. 71-74, recommended the extension of punitive relief to equity cases (over the dissent of Commissioner Earl A. Cherniak, Q.C.), having assumed that they were not clearly available under current Canadian law.

Finally, in *McInerney v. MacDonald*,[27] the court held that failure by the defendant physician to disclose copies of the contents of the plaintiff patient's complete medical file constituted a breach of fiduciary duty. The defendant had been willing to disclose copies of all notes, memoranda and reports that she had herself prepared but refused to produce copies of consultants' reports and other records she had received from other physicians, suggesting to the plaintiff that she might contact the authors of those documents for release of the records in question. This was held to constitute a breach of the fiduciary duty owed by a physician in such circumstances to disclose the contents of the file. The patient was therefore entitled to the remedy of an order that disclosure be made, though the court retained the discretion to refuse to order disclosure in any case where disclosure of the information contained in the records would create "a real potential for harm either to the patient or to a third party".[28]

Interestingly, then, in virtually every case in this line of authority other than *Hodgkinson*, the breach of fiduciary duty in question was a breach of something other than either the conflict rule or the profit rule. Further, in each case, including *Hodgkinson*, the remedies either granted or suggested as being available for breach of fiduciary duty are neither constructive trust nor an accounting of profits.

From materials such as these, one can obviously fashion an account which suggests that the court has taken a rather expansive view of the role of fiduciary obligation in our private, and indeed, public law. Hence, the title of this article. Indeed, it is not too much to suggest that if some of the propositions advanced in these cases are taken to their logical conclusion, fiduciary obligation could swallow whole much of the law of torts and a considerable portion of contractual obligation. The burden of this paper is to attempt to take the measure of these developments and, further, to suggest that not only is it possible to draw a less expansive vision for the role of fiduciary obligation from these authorities but that it is desirable to do so for a variety of reasons. The principal, though not exclusive, focus will be on what might be referred to as the commercial cases and the interaction of fiduciary duty with contractual and tortious liability.

27 [1992] 2 S.C.R. 138, 93 D.L.R. (4th) 415. Cf. *Breen v. Williams* (1996), 70 A.L.J.R. 772 (Aust. H.C.).
28 *Ibid.*, at p. 157.

III. THE DEFINITION OF FIDUCIARY OBLIGATION

The central question of interest relating to the definition of fiduciary obligation, of course, relates to the criterion for recognizing the existence of a fiduciary relationship which falls outside the established categories. In most of the cases in this line of authority, the relationship between the parties came within one of the categories on the established list. In *Guerin, Frame v. Smith, Lac Minerals* and *Hodgkinson*, however, the relationship between the parties did not do so and it became necessary for the court to work within the open-textured category. In the latter two cases, the court divided in an interesting fashion with Sopinka J. writing for the majority in *Lac* and joined in dissent by McLachlin J. in *Hodgkinson* and with La Forest J. dissenting on this point in *Lac* but writing for the plurality of the majority in the *Hodgkinson* case.[29] A full treatment of the definition question and an exhaustive treatment of each of the opinions written by members of the court on this point is beyond the scope of the present article, which will focus instead on four points. First, it will be useful for other purposes in this article to note the possibility that remedial concerns may have a destabilizing influence on matters of definition. Second, the centrality in the definition of a fiduciary relationship of the existence of an undertaking to act on behalf of another may usefully be emphasized. Third, I wish to suggest that the choice of any other criterion as an indispensable talisman for the existence of a fiduciary relationship appears to be unfruitful. Finally, I wish to briefly comment on what appears to be the current status of what might be referred to as the La Forest/Sopinka debate.

1. The Destabilizing Effect of Remedy

In addition to the recognized list of categories of fiduciary relationship and relationships which, on their facts, have the requisite fiduciary character, readers of the law reports well understand that there exists an additional group of what might be referred to as "fictitious" fiduciary relationships. These are relationships which are recognized by the courts as fiduciary in order to provide a doctrinal device for imposing a constructive trust remedy in

[29] In *Hodgkinson*, L'Heureux-Dubé and Gonthier JJ. concurred with La Forest J. Major J. concurred with the dissenting opinion of Sopinka and McLachlin JJ. Iacobucci J. wrote a concurring opinion to form the majority agreeing as to the existence of fiduciary relationship and quantum of damages but apparently differing to some extent with the reasoning of La Forest J. in noting that *Lac* should simply be distinguished on its facts.

order to achieve a just result. The high water mark of this form of ingenuity is often said to be the English decision in *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.*[30] In that case, the plaintiff bank paid in excess of 2 million dollars U.S. to the defendant bank in error for a second time. Before the plaintiff bank took steps to recover the payment, the defendant became insolvent. The plaintiff was clearly entitled to recover the moneys paid under a mistake of fact in quasi-contract or, as it might now be called, a restitutionary or unjust enrichment claim. Under the traditional English doctrine, the remedy in such a case, however, would operate only *in personam*. For obvious reasons, the plaintiff preferred relief *in rem* and sought to impose a constructive trust on the moneys paid. The court obliged by finding that the defendant's refusal to return the money constituted a breach of fiduciary obligation. The fiduciary relationship in such cases is simply a fiction resorted to by the court in order to impose the constructive trust and enable the plaintiff to remove this windfall from the bankrupt's estate.

There are numerous examples of Canadian courts using the fiduciary concept in this instrumental way.[31] The fiction is required, of course, only if one assumes that it is necessary to establish a fiduciary relationship in order to impose a constructive trust. This analytical move became no longer necessary in Canadian common law, however, once the remedial nature of the constructive trust as a remedy for unjust enrichment was recognized by the Supreme Court of Canada.[32] The important point for present purposes is that in the absence of such a modification of the doctrine, the understandable judicial desire to effect just results in particular cases may have a distorting effect on the fashioning of the fiduciary concept. This point was acknowledged by La Forest J. in the *Lac Minerals* case where this use of the term was said to be one which "gives a misleading colouration to the fiduciary concept".[33] When used in this fashion, "the label fiduciary imposes no obligations, but rather is merely instrumental or facilitative in achieving what appears to be the appropriate result".[34] The use of the term fiduciary, "used as a conclusion to justify a result, reads equity backwards. It is a misuse

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30 [1981] Ch. 105.

31 See, for example, the authorities discussed in P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (Aurora, Canada Law Book, 1990), pp. 135-39.

32 *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257. See generally, Maddaugh and McCamus, *ibid.*, at pp. 87-93.

33 *Supra*, footnote 6, at p. 649.

34 *Ibid.*

of the term. It will only be eliminated, however, if the courts give explicit recognition to the existence of a range of remedies, including the constructive trust, available on a principled basis even though outside the context of a fiduciary relationship."[35]

If La Forest J.'s views on this point are adopted, as indeed they should be, the *Chase Manhattan Bank* problem should be made to disappear from Canadian law. A Canadian court minded to impose constructive trust relief on the recipient of a mistaken payment would not need to resort to the fiction of fiduciary relationship but would, rather, simply impose the constructive trust as a restitutionary remedial device.

The point of relevance to the present discussion, however, is a broader one. Our experience with the marriage of constructive trust to fiduciary relationship demonstrates the distorting effect that remedial concerns may have on the definition of the substantive right. Artificial restriction of a remedy to a particular category will create pressure to expand the category. Expansion may lead, as it appeared to here, to incoherence. It may be that, conversely, attaching an unattractive remedy to a substantive right may create pressure for its contraction. This may also lead to incoherence. This is a point to which I will return.

2. The Centrality of Undertaking

Discussions of the nature of fiduciary obligation, both in the secondary literature and in judicial opinions, are inclined to begin with a statement to the effect that a fiduciary is an individual who has undertaken to act in the interests of another. The following statement of Professor A.W. Scott is often quoted:[36]

> A fiduciary is a person who undertakes to act in the interests of another person. It is immaterial whether the undertaking is in the form of a contract. It is immaterial that the undertaking is gratuitous.

Under its traditional formulation, then, the law of fiduciary obligation merely requires the fiduciary to carry out that undertaking. Failure to do so by allowing self-interest to intervene will be met by the disgorgement remedies. When it is said, as it often is, that fiduciary relationships will not commonly arise in the context of arm's-length commercial dealings, it is obvious why this would be so. People in such relationships do not normally understand themselves to be acting on behalf of each other. They may profit

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[35] *Ibid.*, at p. 652.
[36] A.W. Scott, "The Fiduciary Principle" (1949), 37 Cal. L. Rev. 539 at p. 540.

at each other's expense without committing a breach of fiduciary obligation. The existence of an undertaking to act on behalf of another, however, provides a foundation for the imposition of the duty to so act on the fiduciary and the vindication of the principal's expectation of loyalty.[37] This is not to say, of course, that it would be inconceivable to live in a world in which fiduciary-type duties were imposed in the absence of an undertaking to act on behalf of another. It is only to suggest that some other policy foundation would need to be established for the imposition of the obligation and that the theoretical basis for doing so would be something other than that underpinning traditional fiduciary doctrine.

In the recent Supreme Court cases there was initially some evidence that the definition of fiduciary obligation was to be cut adrift from its foundation in undertakings of this kind. In an influential statement in the dissenting opinion in *Frame v. Smith*,[38] Wilson J. offered the following guidance:[39]

> [T]here are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

It may well be that the absence of an element in this definition requiring an undertaking to act on behalf of another plays some part in the explanation for Wilson J.'s view, in this case, that a custodial parent is subject to a fiduciary obligation to facilitate access by the estranged non-custodial parent. Such parties would perhaps typically view themselves as adversaries rather than as individuals acting on each other's behalf. The duty that Wilson J. would have imposed is thus not fiduciary in the usual sense of the

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37 This is not to suggest that lack of subjective intent to so act is or should be a defence to a claim for breach of fiduciary duty. It is sufficient that the fiduciary is doing a task or providing a service for the other that reasonably gives rise to the expectation. Cf. L. Smith, "Fiduciary Relationships — Arising in Commercial Contexts — Investment Advisors: *Hodgkinson v. Simms*" (1995), 74 Can. Bar. Rev. 714, especially at pp. 721-24.

38 *Supra*, footnote 12.

39 *Ibid.*, at p. 136.

term, but, rather, a duty being imposed to vindicate a particular policy within the realm of family law.

Although the majority in *Frame v. Smith* were of the view that the statutory family law scheme was comprehensive and therefore should not be supplemented by the creation of a civil action either in tort or in fiduciary obligation, the influence of the definition of fiduciary obligation offered by Wilson J. has extended into the subsequent cases. Thus in *Lac Minerals* both Sopinka J. who wrote for the majority on this point and La Forest J. quoted this passage from Wilson J.'s opinion in *Frame v. Smith* as a jumping off point for their discussion of the criterion for recognizing the existence of a fiduciary relationship. It will be recalled that in the *Lac* case, Lac and Corona had begun discussions with a view to entering into a joint venture to develop a mining project owned by Corona. In the course of those discussions, confidential information concerning mineralization was disclosed by Corona to Lac and the latter purchased options on neighbouring properties on which Lac subsequently developed a remarkably prosperous mining venture. Although both Sopinka and La Forest JJ. noted that fiduciary relationships will normally not arise in the context of arm's-length commercial dealing, they differed on whether such a relationship could arise in the context of these facts. For Sopinka J., the mere disclosure of confidential information would give rise to a duty of confidence but could not, in itself, elevate a relationship between two parties bargaining towards an agreement into a relationship having a fiduciary character. For La Forest J., however, the disclosure of confidential information in the course of negotiations appeared to play a critical role in establishing that a relationship of "trust and confidence"[40] had been created. This factor, together with the evidence of the president of Lac — to the effect that once confidential information had been disclosed in such circumstances, the industry expectation would be that the recipient would not exploit it to the disadvantage of the discloser[41] — gave the relationship between the parties the necessary fiduciary character. La Forest J. also agreed with Sopinka J. that once the confidential information has been disclosed, a duty of confidence would arise which had also been breached in this case.

One can only speculate as to whether the absence of an emphasis on the existence of an undertaking to act on behalf of another in

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40 *Supra*, footnote 6, at pp. 656-59.
41 *Ibid.*, at p. 659.

the definition authored by Wilson J. was of some influence in enabling La Forest J. to come to the conclusion that parties negotiating towards a joint venture may acquire a fiduciary relationship through the disclosure of confidential information. It does seem unlikely, as a practical matter, that negotiating parties would view themselves as acting on each other's behalf. Again, it is clear that the disclosure created the duty not to breach or exploit the confidence. Many may find persuasive, however, the majority view that the relationship was in other respects an arm's-length commercial relationship. Indeed, a rule which too easily converted disclosure of confidential information in the midst of negotiations into a fiduciary relationship might unattractively create opportunities for strategic behaviour by bargainers.

In the more recent decision in *Hodgkinson*,[42] however, La Forest J. placed considerable emphasis on the importance of finding an undertaking to act on behalf of another in establishing the existence of a fiduciary relationship and, further, appeared to confine the influence of Wilson J.'s definition of fiduciary duty to an explanatory role relating to the determination of particular classes of relationship as being fiduciary in nature. Thus, having paraphrased Wilson J.'s definition and having drawn a distinction between fiduciary relationships which come within the recognized classes of fiduciary relationship (such as "trustee-beneficiary and agent-principal")[43] and those which arise on the particular facts of a relationship which falls outside those classes, La Forest J. went on to observe that "[i]n seeking to determine whether new classes of relationships are *per se* fiduciary, Wilson J.'s three-step analysis is a useful guide."[44] However, La Forest J. further observed that the three-step analysis "encounters difficulties" in identifying fiduciary relationships which "arise as a matter of fact out of the specific circumstances of that particular relationship".[45] La Forest J. then identified the critical question to be addressed in such cases in the following terms:[46]

> In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter in

42 *Supra*, footnote 8.

43 *Ibid.*, at p. 409.

44 *Ibid.*

45 *Ibid.*, at p. 409. This restriction of the validity of Wilson J.'s approach to category recognition rather than individual fiduciary relationship recognition may well be implicit in La Forest J.'s opinion in *Lac*. See, *supra*, footnote 6, at pp. 647-48.

46 *Hodgkinson, ibid.*, at pp. 409-10.

> issue . . . [t]hus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.

If the combined effect of Wilson J.'s opinion in *Frame v. Smith* and La Forest J.'s proposed holding in *Lac Minerals*, then, was to leave open the impression that the finding of an undertaking to act on behalf of another was less than central to the definition of fiduciary obligation favoured by La Forest J., any such concern has been laid to rest by the opinion in *Hodgkinson*. The starting point for the identification of fiduciary obligation, then, must be to find the existence of such an undertaking. On the facts of *Hodgkinson*, that undertaking was found in Simms' retainer to provide Hodgkinson with investment advice, in circumstances where Simms, on his own evidence, understood that Hodgkinson expected that advice to be given in a disinterested manner.

3. The Non-Essential Nature of Other Factors

In addition to the threshold finding of an undertaking to act in the other's interest, many jurists and authors, including the members of the Supreme Court of Canada who have written opinions in the cases under review, have attempted to identify other factors that are of assistance in reaching the conclusion that a fiduciary relationship arises on a particular set of facts. In *Hodgkinson*, La Forest J. for example mentioned discretion, influence, vulnerability and trust "as non-exhaustive examples of evidential factors to be considered in making this determination".[47] Where, as in *Hodgkinson*, the defendant is a professional, "the rules set by the relevant professional body are of guiding importance in determining the nature of the duties flowing from a particular professional relationship".[48] In *Lac*, La Forest J. identified such factors as trust and confidence, industry practice and vulnerability as relevant considerations.[49] Professor Finn's list includes "ascendency, influence, vulnerability, trust, confidence and dependence".[50] Others have suggested the relevance of the fact that the position held is one that involves the holding of property of the other or facilitates profit-taking.[51] Although such suggestions are normally coupled with an

47 *Ibid.*, at p. 409.
48 *Ibid.*, at p. 425.
49 *Supra*, footnote 6, at p. 656.
50 P.D. Finn, "The Fiduciary Principle" in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto, Carswell, 1989) at p. 46.
51 Maddaugh and McCamus, *supra*, footnote 31, at pp. 577-78.

indication that no particular factor is essential to a finding of fiduciary relationship, there is often a detectable preference for a particular factor either stated or indicated less directly in such discussions. Indications of this kind are found in a number of the recent opinions. Thus, in *Frame v. Smith* Wilson J. emphasized the importance of "discretion", that is, a discretion to act unilaterally at the expense of a vulnerable principal.[52] In *Lac*, Sopinka J. emphasized the importance of "dependency or vulnerability" which was, he said, the "vital ingredient [which] was virtually lacking in this case".[53] In *Hodgkinson v. Simms*, Sopinka and McLachlin JJ. emphasized the importance of "reliance and dependency on the fiduciary by the beneficiary" which, they said, must be "total".[54] So varied are the types of relationships and types of circumstances in which fiduciary relationship will arise, however, it appears unlikely that an attempt to give pride of place to any particular factor or factors will be fruitful.

It is possible, for example, to exaggerate the importance of "discretion" in the identification of fiduciary relationships. Many fiduciaries, surely, will carry out tasks that may involve very little discretionary power, but may nonetheless be subject to a fiduciary obligation. The fact that a sales agent might enjoy very little room for manoeuvre would not make the taking of a bribe or other secret profit less than a fiduciary breach. Fletcher Moulton L.J.'s famous example of the errand boy[55] suggests a fiduciary who may possess virtually no discretion, but nonetheless have a fiduciary obligation relating to the change. So too, if "vulnerability" is defined as requiring personal frailty or inequality of bargaining power, as appeared to have been the view of the majority in *Lac*, there will certainly be many fiduciary relationships in which such a power imbalance is not present. The relationship between director and corporation offers but one illustration.

Similarly, in the context of relationships that involve the giving of professional advice, it would appear most unlikely that fiduciary duties would cease if the person receiving the advice sought a second opinion or assessed the advice carefully, even if, in such circumstance, it could hardly be said the reliance being placed on the advice was "total". One might still be entitled to disinterested

52 *Supra*, footnote 12, at p. 136.
53 *Supra*, footnote 6, at p. 606.
54 *Supra*, footnote 8, at p. 467.
55 *Coomber (Re)*, [1911] 1 Ch. 723 (C.A.) at p. 728, quoted with approval in *Lac*, *supra*, footnote 6, at p. 670 *per* La Forest J.

advice even if the advice is accepted carefully and reflectively. In *Hodgkinson*, as has been indicated, Sopinka and McLachlin JJ. were of the view that, given the spectrum of possible reliance from total independence to total reliance, "the law has imposed a fiduciary obligation only at the extreme of total reliance".[56] The plurality view, however, was that the degree of reliance was an important factor to consider in the context of a relationship of an advisory nature, but that "reliance in this context does not require a wholesale substitution of decision-making power from the investor to the advisor".[57] On cross-examination, Simms conceded that Hodgkinson was looking to him for "'advice which was not directed towards protecting [his] personal interests but was directed exclusively to protecting [Hodgkinson's interest]'".[58] In such circumstances, the finding of a fiduciary relationship appears amply justified even if the reliance placed on that advice could not said to be total or absolute.

As a matter of authority — and with the possible exception of *Lac*, to which we must presently return — there does not appear to be much support in these recent cases for the identification of a critical factor or a combination of factors that must invariably be present in addition to the undertaking to act on another's behalf. No doubt, individual judges will weigh particular factors in different contexts in different ways, but these authorities do not depart in an authoritative way from the traditional view that these are matters of evidence which may, to varying degrees, be helpful in making a finding that "one party could reasonably have expected that the other party would act in the former's best interest with respect to the subject matter at issue".[59]

4. The La Forest-Sopinka Debate

The recurrence of a strong division of opinion between La Forest J. and Sopinka J. in *Hodgkinson*, so soon after *Lac*, with Sopinka J.'s views prevailing in *Lac* and those of La Forest J. occupying the plurality in *Hodgkinson*, may invite speculation that the balance of opinion in the court, on some rather important point relating to fiduciary law, has now shifted from the views of the majority in *Lac* in favour of the approach taken by La Forest J.

56 *Supra*, footnote 8, at p. 468.
57 *Ibid.*, at p. 432.
58 *Ibid.*, at p. 429.
59 *Ibid.*, at p. 409.

Alternatively, the failure of La Forest J. to attract a clear majority to his reasons in *Hodgkinson* may be thought to carry with it the persistence, on an important question of principle, of the majority opinion in *Lac*. Certainly, it is possible to read the opinions in *Hodgkinson* itself in support of such views.

My own view, however, is that the result of the exchange in *Hodgkinson* is that there is now very little evidence of a strong disagreement between two factions of the court on any important question of principle relating to the definition of fiduciary relationship. Apart from the question briefly alluded to above, the question of just how much reliance must be placed on a professional adviser in order to attract fiduciary status, there does not appear to be any significant difference on a matter of principle between the two factions. Indeed, their views also appear to be quite orthodox. Both agree on the centrality of undertaking. Both agree, in general terms, on the factors to be taken into account in finding a fiduciary relationship. Even on the reliance point, there appears to be very little difference in principle separating the two approaches. It was La Forest J.'s view that reliance in the advisory context needed to be "such that the respondent's advice was in substance an exercise of a power or discretion reposed in him by the appellant".[60] The fact that Simms conceded that Hodgkinson trusted him and was looking to him for independent and loyal advice was sufficient from La Forest J.'s perspective to warrant the finding of fiduciary relationship. For Sopinka and McLachlin JJ., the question to be addressed was whether, in the particular relationship there has been a "ceding by one party of effective power to the other".[61] What is common to both positions, apparently, is that for a professional adviser who does not come within the established list of fiduciary relationships to attract a fiduciary obligation, the client's reliance on that advice must be very substantial.

The other potential candidate for an important difference in principle would be the concept of "vulnerability". In *Lac*, La Forest and Sopinka JJ. took rather different approaches to the factor of "vulnerability". For La Forest J. vulnerability was to be interpreted simply as a requirement that the alleged fiduciary be shown to be in a position to inflict harm or injury on the person to whom the duty is owed. As has been mentioned, the approach taken by Sopinka J. appeared to interpret this requirement as one

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60 *Ibid*, at p. 432.
61 *Ibid.*, at p. 466.

to be evidenced by some kind of "physical and psychological dependency".[62]

La Forest J.'s view of vulnerability appears to point to a factor inherent in any situation in which one person undertakes to act on behalf of another. While this gives it the virtue of universality, it does not appear to add much to the requirement that such an undertaking exist. Sopinka J.'s narrower view of vulnerability is plainly something other than the mere fact of undertaking. The difficulty with this view, however, is that it does not appear to be an indispensable prerequisite to a finding of fiduciary relationship.

In *Hodgkinson*, however, this difference of approach appears to vanish. Sopinka and McLachlin JJ. observed that "[v]ulnerability does not mean merely 'weak' or 'weaker'. It connotes a relationship of dependency, an 'implicit dependency' by the beneficiary on the fiduciary . . . a relationship where one party has ceded power to the other and is, hence, literally 'at the mercy' of the other".[63] Again, if vulnerability is for Sopinka and McLachlin JJ. inherent in empowering another to act on one's behalf, the difference in principle between the two approaches seems very slight indeed.

It is true, of course, that in both *Lac* and *Hodgkinson*, Sopinka J. was of the view that no fiduciary obligation should be found to exist and La Forest J. came to the opposite conclusion. It is perhaps less surprising that the court divided on the difficult facts of the *Lac Minerals* case, where the facts were arguably beyond but perhaps tantalizing close to the range of situations in which fiduciary obligations have been found in the past. The difference in conclusions seems more remarkable in *Hodgkinson*, however, where the defendant is a professional investment adviser, who well appreciates that he has been looked to and relied upon for independent and selfless advice. Such facts would appear to come comfortably within the range of fact situations in which fiduciary obligation will be found. One is drawn, therefore, to speculate as to the reasons why the minority in *Hodgkinson* was reluctant to find a fiduciary obligation. A strong hint, I would suggest, is to be found in the following passage from the dissenting opinion:[64]

> Phrases like 'unilateral exercise of power', 'at the mercy of the other's discretion' and 'has given over that power' suggest a total reliance and dependence on the fiduciary by the beneficiary. In our view, these phrases are

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62 *Supra*, footnote 6, at p. 606.
63 *Supra*, footnote 8, at p. 467.
64 *Ibid.* (emphasis added).

> not empty verbiage. The courts and writers have used them advisedly, concerned for the need for clarity and aware of the *draconian consequences* of the imposition of fiduciary obligation.

In *Hodgkinson*, it will be recalled, the plaintiff sought full indemnification for his losses in the real estate market relying, in part, on the theory that equitable compensation for breach of fiduciary obligation would yield such relief unconstrained by rules that might be relevant to the calculation of damages for breach of contract. Although La Forest J. was of the view that such compensation was available either on the basis of principles of equitable compensation, or on the basis of contractual doctrine, Sopinka and McLachlin JJ. were of the view that such relief would not be available in contract for two reasons. First, in order to recover damages of this kind for breach of contract, it would be necessary to establish that the non-disclosure of Simm's interest had caused the loss. This was not the case, in their view. The loss resulted from an economic downturn rather than from the failure to make full disclosure. Second, the doctrine of *Hadley v. Baxendale*[65] prevented recovery of losses of this kind which the parties would not have reasonably contemplated "as liable to result from the respondent's breach of his duty to make full disclosure".[66] For Sopinka and McLachlin JJ., then, a finding of fiduciary obligation would carry with it the prospects of a damage award well beyond that available for breach of contract and would provide the plaintiff with insurance against losses in the real estate market for which he had not bargained.

If I have correctly diagnosed the source of the minority's reluctance to find a fiduciary obligation, two further observations are appropriate. First, this may be a live example of the phenomenon referred to earlier — the distorting effect of remedial concerns on the definition of the substantive right. One may wonder whether Sopinka and McLachlin JJ. would have been so reluctant to find the existence of a fiduciary relationship if the only consequence of doing so was to strip the defendant Simms of the secret profits made upon the sale of the MURBS to Hodgkinson. It may well be that the damage awards for breach of fiduciary duty developed by this line of cases may inspire some judges, at least, to give a rather narrow reading to the doctrine of fiduciary obligation. If this is so, it may be suggested that the more expansive remedies for fiduciary

65 (1854), 9 Ex. 341.

66 *Supra*, footnote 8, at p. 478.

obligation envisaged by these recent authorities should be considered a rather mixed blessing.

IV. EQUITABLE COMPENSATION AND THE NEW FIDUCIARY DUTIES

Earlier, I suggested that the new Supreme Court jurisprudence on fiduciary obligation, if carried to its logical conclusion, could absorb substantial portions of the law of tort and contract. It is time to make that charge stick, if it can be done, before turning to a consideration of its implications. In support of this proposition, attention must be drawn to two of the developments briefly alluded to in the opening section of this paper. Both of these developments involve substantial extensions of the doctrine of *Nocton v. Ashburton (Lord)*[67] and it will be helpful, therefore, to provide a brief account of this old chestnut.

Keeping in mind that the traditional remedies for a breach of the fiduciary duties to avoid conflict and refrain from profiting are the constructive trust and an accounting, it is to *Nocton v. Ashburton (Lord)* that one must turn to find evidence of a jurisdiction to award monetary compensation for breach of fiduciary duty. Nocton was a solicitor who had retained an interest in property sold to a builder. His client, Lord Ashburton, had advanced moneys on a first mortgage on the same property given by the builder. Nocton, carelessly it was thought, advised his client to release a portion of the client's interest in the land with the result that Nocton's own interest was advanced. Upon the builder's default on the mortgage, the security proved inadequate and Lord Ashburton sought compensation from Nocton on three grounds, two of which failed. Lord Ashburton's claim in deceit was dismissed because Nocton's misconduct failed to meet the fraud threshold set out by the House of Lords a few decades before in *Derry v. Peek*.[68] Tortious liability for negligent statement, of course, had not yet been invented. Lord Ashburton's claim for damages for breach of contract flowing from Nocton's failure to exercise reasonable professional skill and care was held to be statute-barred. The third claim, which enjoyed success, arose from Nocton's breach of fiduciary duty in failing to disclose his conflict. Lord Ashburton was awarded equitable compensation or damages for the loss resulting from the breach.

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67 *Supra*, footnote 7.

68 (1989), 14 App. Cas. 337.

In the recent cases, the Supreme Court has made available equitable compensation of this kind with respect to a new range of fiduciary duties which fall outside the traditional fiduciary duty of loyalty. The first extension has been to award equitable compensation for injuries resulting from a failure to perform an undertaking. Thus, in *Guerin*,[69] the fiduciary breach involved a failure to follow the principal's instructions with respect to the negotiation of a lease. In *Canson*,[70] the fiduciary breach consisted of the defendant solicitor's failure to provide full and complete information with respect to the nature of the transaction his client was entering. There is no suggestion in either case, then, of a conflict of interest, or an improper profit-taking. The fiduciary breach in *Canson* would also appear to be a breach of the solicitor's contractual obligation to provide service at a reasonable professional standard.[71] In another factual setting, the breach in *Guerin* would also likely be caught in a contractual net.

The second extension anticipated in *Norberg*[72] and adopted by the majority of the court in *M. (K.) v. M. (H.)*[73] was to recognize that equitable compensation could be available to vindicate interests other than the economic interests protected by traditional fiduciary law. In her dissenting opinion in *Frame v. Smith*, Wilson J. suggested that fiduciary duties should not be considered to be confined to what she referred to as the "legal interests" of the beneficiary but should be extended to protect the "vital non-legal or 'practical' interests".[74] As authority for this proposition Wilson J. relied upon the well-known decision in *Reading v. The Attorney General*[75] in which the Crown was able to recover the ill-gotten gains of a non-commissioned officer who used his leisure time to display himself in uniform on lorries being driven through Cairo by various individuals who were prepared to pay him for the privilege of his company. The Crown's claim for the improperly obtained moneys has a traditional

69 *Supra*, footnote 11.

70 *Supra*, footnote 15.

71 Cf. the remarks of Southin J. in *Girardet v. Crease & Co.* referred to *supra*, footnote 6. Also see *Mortgage Express Ltd. v. Bowerman & Partners*, [1996] 2 All E.R. 836 (C.A.); *Mothew v. Bristol & West Building Society* (unreported, July 24, 1996, Eng. C.A.) (liability for professional negligence on facts similar to *Canson*). In *Canson* itself, the plaintiff ultimately recovered the difference between the contract price and the market value of the property, with interest, as damages for breach of fiduciary duty: see *Canson Enterprises v. Boughton & Co.*, [1996] 1 W.W.R. 412, 11 B.C.L.R. (3d) 262 (C.A.).

72 *Supra*, footnote 19.

73 *Supra*, footnote 25.

74 *Supra*, footnote 12, at p. 136.

75 [1951] A.C. 507 (H.L.).

fiduciary appearance, but it might be said that the real interest of the Crown is reputational or diplomatic. Further, it was suggested that even in the context of more traditional fiduciary relationships such as that between director and corporation, the interest of the corporation in faithful performance is not merely economic in nature but might extend to reputational and other practical interests. Thus pried loose from the protection of more coldly economic interests, Wilson J. would have extended the protection of fiduciary law to the interest of a non-custodial parent in gaining proper access to the children of the marriage. Relying on this line of analysis, McLachlin J., in *Norberg*, would have categorized the defendant physician's sexual assault of his patient as a breach of fiduciary duty. In *M. (K.) v. M. (H.)*, a majority of the court held that the defendant father's instigation of an incestuous relationship with the plaintiff daughter constituted not only a battery, but a breach of fiduciary duty.

Even though there might be concurrent claims in contract or tort in many of these types of situations, the plaintiff nonetheless will often have a powerful incentive for seeking to invoke equitable doctrine. The reason for doing so, of course, it is to avoid various inconveniences thrown up by the common law of contract and tort or the law of limitations. If, as the court plainly held in *Guerin*, equitable compensation is to be calculated on trust principles, damage awards far in excess of those available for breach of contract are potentially available. The defaulting "trustee" is subject to the presumption that but for the breach, the beneficiary would have made the most advantageous investment of the trust assets possible. The court has also acknowledged the potential applicability of the principle which holds trustees liable to restore the trust estate to the same position as it would been in if no breach had been committed. As is said, "considerations of causation, foreseeability and remoteness do not readily enter into the matter".[76] It was on this basis that the plaintiff in *Canson* sought to recover losses in the millions which were not causally linked to the defendant solicitor's breach of fiduciary duty. In *Norberg*, the plaintiff sought to invoke fiduciary breach to find a more congenial analytical context than the tort of battery to consider whether she had voluntarily consented to the exchange of sexual favours for

[76] *Dawson (Re); Union Fidelity Trustee Co. Ltd. v. Perpetual Trustee Co. Ltd.* (1966), 84 W.N. (Part I) (N.S.W.) 399 at p. 404, *per* Street J. quoted with approval by Wilson J. in *Guerin*, *supra*, footnote 11, at p. 360.

drugs. In *M. (K.) v. M. (H.)* the plaintiff sought to avoid the limitations rules that might apply to the action at common law and invoke the more generous principles relating to equitable claims.

In each of these cases, then, the plaintiff was seeking, in effect, a modification of a doctrine of the common law through the construction of a new type of breach of fiduciary obligation and the awarding of damages or compensation on equitable principles for the losses flowing from the breach. This line of authority amply demonstrates that, potentially at least, this reform device has a rather broad sweep. Unless the decision in *Guerin* is considered to be *sui generis* because of the unusual nature of the relationship between the federal government and the Indian bands, it is not obvious why failure to follow instructions would not constitute a breach of fiduciary obligation when committed by, for example, an agent or lawyer. Would other kinds of defaults, such as negligence in the conduct of negotiations, constitute a breach of the fiduciary obligation imposed in *Guerin*? If so, it is again not obvious why similar breaches by fiduciaries in other contractual settings would not be captured by the doctrine. Will the ability of fiduciary duty to protect the non-economic interests recognized in *M. (K.) v. M. (H.)* be extended to other kinds of fiduciary relationships and to other kinds of unlawful conduct? Would a lawyer or other fiduciary who committed a non-sexual assault or the torts of conspiracy or defamation be exposed to equitable compensation for breach of fiduciary duty as an alternative to liability in tort?

Doctrinal conservatives will view this reform potential with grave misgivings, perhaps horror. Even if one assumes, however, as I do, that the judiciary generally and the Supreme Court more particularly bears the burdensome responsibility of reshaping and adjusting private law doctrine in order to both render it more just and consistent and to render it more suitable to changing social and economic conditions, it must be asked whether the invention of new types of fiduciary duties with respect to which equitable compensation is to be awarded is the most suitable device for facilitating such change. There are some considerations, I will argue, that suggest that the device is one which has some unattractive features.

V. EQUITABLE COMPENSATION AS LAW REFORMER

Prior to these recent developments one might have said that tort law is the exclusive body of private law doctrine within which the courts have attempted to delineate as best they can, the principles for imposing liability for compensatory damages arising from unprivileged or wrongful conduct. In these recent cases, there is a very real sense in which it can be said that the Supreme Court is in the process of reinventing tort law as equitable compensation for breach of fiduciary duty. The possibility of overlap between tort and fiduciary law is, of course, not new. Some breaches of the traditional fiduciary duties would amount to deceit. Under the traditional position, however, the form of relief is distinct. The profits taken by the fiduciary breach would be pursued in equity. The victim who sought compensatory damages would sue in tort. Even though equitable compensation for careless misstatement, in effect, was recognized in *Nocton v. Ashburton (Lord)*, there appears to be little evidence in the law reports of deceit victims suing for equitable compensation for fiduciary breach in order to avoid such common law principles as causation, remoteness or foreseeability. In theory, at least, this has now become possible.

If it is true that equitable compensation for fiduciary breach may come to occupy much of the terrain formerly occupied exclusively by tort and, moreover, to overlay it with a body of equitable doctrine, one might ask whether there is any harm in this. If equity can effect a series of reforms to tort law, it might be suggested, so much the better. Is this a matter of equity simply reasserting its historic role of remedying defects in common law doctrine? I would suggest there are at least three interrelated difficulties.

The first might be referred to as the *Nocton v. Ashburton (Lord)* problem. Simply stated, the point is that if the law of torts suffers from a defect, a reform which applies only to parties in a fiduciary relationship may offer a very incomplete solution to the problem. *Nocton* itself illustrates this difficulty. The historical record strongly suggests that the *Nocton* decision[77] represents a conscious effort by the House of Lords to pull back from the very high fraud threshold set in *Derry v. Peek*[78] for imposing liability for misstatement. Pollock reported, at the time, that in holding that a lower threshold would apply to someone with a fiduciary duty, such as a solicitor, the Lords were going "as near as they dare to saying [*Derry v. Peek*] was wrong, as all Lincoln's Inn thought at the

[77] *Supra*, footnote 7.
[78] *Supra*, footnote 68.

time".[79] As a reform of *Derry v. Peek*, however, the *Nocton* holding is very limited indeed. It applies only to a very particular kind of misleading statement — a failure to disclose a conflict — in the context of a very particular kind of relationship. Subject to this minor qualification, *Derry v. Peek* served for many more decades as the law of England for all practical purposes until a more comprehensive adjustment to the common law was effected in *Hedley Byrne & Co. v. Heller & Partners Ltd.*[80]

Turning to examples drawn from the recent Supreme Court jurisprudence, if there is a deficiency in the current law of civil liability for sexual assault, it seems rather unlikely that the problem can be effectively solved by tinkering with the rules that apply to sexual assaults committed by individuals who are in the course of performing a fiduciary undertaking. In *Norberg*, it was suggested that the common law of battery was deficient on the consent point and that the principles for calculating damages were not sufficiently generous. In *M. (K.) v. M. (H.)*, it was suggested that the common law limitation doctrines applied unfairly to a case where the connection between subsequent psychological distress and the tortious misconduct was only discovered well after the limitation period expired. With respect to each of these issues, I would suggest, a reform which developed satisfactory doctrine only to deal with sexual assaults committed by physicians or parents and not those committed by more distant relatives, neighbours and others who have a professional, but not a fiduciary, relationship to the victim seems inadequate. A more effective solution than creative application of fiduciary law, then, would be creative adjustment of the tort principles themselves. It is reassuring, therefore, that the majority in both of these cases apparently concluded that the reforms advocated on the plaintiff's behalf could be accommodated by adjustment of the applicable tort principles.

A related concern arises from the fact that the doctrines of fiduciary law were developed with a different type of liability in mind than that imposed by the law of tort. The central concern of fiduciary law, as has been suggested, has been the improper taking of profits. The liability imposed has been that of lifting those

79 In a letter from Pollock to Holmes in May of 1914 quoted by Gummow, *supra*, footnote 14 at p. 57. See M. DeWolfe Howe, ed., *Holmes-Pollock Letters; the correspondence of Mr. Justice Holmes and Sir Frederick Pollock*, 1874-1932 vol. 1 (Cambridge, Harvard U. Press, 1941) at pp. 214-15.

80 [1964] A.C. 465 (H.L.).

profits. The law of torts, of course, imposes liability to compensate for injuries sustained as a result of the defendant's wrongful conduct. It is one thing, I would suggest, to require someone to disgorge profits they have acquired in an unattractive way, quite another to impose on an individual liability to, in effect, insure the risk of injuries sustained by another. It may be very disappointing indeed to be stripped of one's profits. The imposition of liability in damages for tortious wrongdoing, of course, may be simply ruinous. The difference in the nature of the liability imposed in the two different categories of obligation may help to explain why it is that the duties imposed in fiduciary law appear to be more onerous and exacting than those imposed by the law of torts. Cardozo C.J. emphasized the strictness of the standard imposed on fiduciaries colourfully in *Meinhard v. Salmon*[81] in the following terms:[82]

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honour the most sensitive, is then the standard of behaviour. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

Again, lifting dishonourable profits is a very different matter from imposing an obligation to act as an insurer of another's losses. Duties designed with one type of liability in mind may not serve us well when considering whether another and much more comprehensive or burdensome form of liability should be imposed.

A similar difficulty arises from the suggestion that appears to have been taken seriously, though not yet clearly acted upon by the majority of the court in any case other than *Guerin*, that the calculation of compensatory damages for breach of fiduciary duty is to be made on the basis of equitable principles. These would operate more generously to the plaintiff than common law rules relating to such matters as causation, foreseeability, mitigation and the like. If, as I have suggested above, there is a potential mismatch between the duties developed in fiduciary law and the awarding of compensatory damages, this difficulty is further aggravated by an approach of this kind. I appreciate, of course, that express trustees

81 249 N.Y. 458 (C.A. 1928).

82 *Ibid.* at p. 464.

are subject both to high and exacting standards and to compensatory damages calculated on the more generous equitable basis. It may be argued, then, that this approach can simply be extended by analogy to non-trustee fiduciaries. The answer must be that as the fiduciary task or role and responsibilities of the non-trustee fiduciary begin to look less and less like that of an express trustee, the analogy may well break down. Indeed, with the non-trustee fiduciary, the imposition of the trustee-like liability for compensatory damages may well appear to be draconian and may well create pressure on the courts to restrict the application of the fiduciary label more narrowly than it has been in the past. I have already suggested that this force appears to be at work in the dissenting opinion in the *Hodgkinson* case.

In short, as a means of reforming the law of tort, equitable compensation is likely to produce only incomplete and cramped reform. It runs the risk of mismatching duty and remedy, all the more so if the compensatory damages for breach of fiduciary duty are to be calculated in the manner in which liability is imposed upon the express trustee. Further, these developments carry with them the risk that the notion of fiduciary relationship may shrink in order to avoid the imposition of draconian remedies on individuals who might otherwise have been subject to fiduciary duties relating to the taking of improper profits.

Finally, one might suggest that a reform methodology which rests simply on the invocation of equity runs the risk of avoiding an obligation to engage in the kind of confrontation with the doctrines and policies of common law that would be entailed in a direct overruling. Thus, if the law of torts represents the collective best attempt of the judiciary to fashion principles for defining circumstances in which one person should serve as an insurer of another's losses, a strategy that requires direct overruling of the old doctrine may have some advantages. It would force the courts to articulate very carefully their critique of the existing doctrine and the policy rationale underlining the proposed reform. If our courts are, however, to proceed by way of developing new doctrines through the device of equitable compensation for breach of fiduciary duty, it may be very important for them to follow the approach advocated by La Forest J. in *Canson* to the effect that in developing the principles of equitable compensation, the courts should have due regard to the principles of common law.

Similar points can be made with respect to the prospects for equitable compensation for fiduciary breach serving as a fruitful device for the reform of the law of contracts. Again, the possibility of concurrent liability or overlap between fiduciary obligation and contract is not new. Many traditional breaches of fiduciary duty — such as non-disclosure of a conflict by a solicitor — would constitute both a breach of fiduciary duty and a breach of the contract to provide professional service at a reasonable standard. Under traditional doctrine, however, fiduciary duty would be resorted to only to recover the ill-gotten gains. If the client suffered loss as a result of the breach of duty, a claim would be advanced for contractual breach. As *Hodgkinson* demonstrates, however, the new development is that the courts may be confronted with a series of claims in which the plaintiff seeks compensatory damages for breach of fiduciary duty in the hope that they might be calculated on the trust rather than the contract model. If the doctrines of equitable compensation are to be developed in response to deficiencies in the law of contracts, the reform effected is likely to be an incomplete one. Again, though it may well be that the law of contract would be improved by a greater embrace of equitable notions, it is nonetheless true that it is within the conceptual construct of the law of contracts that the courts have attempted to think carefully about the principles by which liability should be imposed to compensate a promisee for injuries resulting from the promisor's failure to carry out an undertaking. Accordingly, a careful examination of the policy and principles underlying the common law rules would appear to be a desirable prelude to the development of markedly different principles for calculating equitable damages for breach of undertakings by fiduciaries.

VI. TOWARD A LESS EXPANSIVE READING

If one accepts the thesis advanced here — that this line of authority, if extended to its logical extremes, is capable of effecting dramatic and potentially unattractive reform — it may be asked whether a less expansive reading of these cases is possible. The answer to this question, in my view, is affirmative. I have argued above[83] that there is an apparent consensus of the court on definitional matters which reflects a rather traditional view of the definition of fiduciary relationship. The less orthodox views pertain to the growing list of types of fiduciary duties and the expanding use of equitable compensation or damages for breach. As has been argued

83 See the text accompanying footnotes 35 to 56.

above,[84] it is within this context that the growth of fiduciary law and the possibility of cramped or incomplete reform of the doctrines of tort and contract appear to lie. If one examines the results of the cases, however, it may be thought that these prospects are more theoretical than real. In none of the decided cases, apart from *McInerney* and *Guerin*, does the court achieve a result which is linked only to an expanded view of fiduciary duty or equitable compensation. In *Hodgkinson*, for example, the result was held by the majority to rest not only on breach of fiduciary duty but on a valid claim for damages for breach of contract. In *Norberg* and *M. (K.) v. M. (H.)* the results were warranted, in the majority view, on the basis of both fiduciary analysis and the law of tort. In *Canson, Lac* and *Frame*, the claim for breach of fiduciary obligation did not enjoy success. In the main then, the results of these cases do not demonstrate that equitable compensation for fiduciary breach is in fact being utilized by the court to overhaul existing principles of the law of contract and tort.

The two cases — *McInerney* and *Guerin* — which adopt novel approaches might be considered to be *sui generis*. The first deals with the rather particular problem of disclosure of health information and may not be considered to create, in effect, a new access to information scheme for private sector fiduciaries. In *Guerin*, the unique history of the relationship between the federal government and aboriginal groups, together with the trustee-like role of the former in dealing with the property of the latter, may be thought to create a special need for creative intervention by the courts not present or not present to the same degree in other contexts.

The results of these cases thus offer little support for the view that fiduciary law is trampling out of control through well-kept gardens of the common law of contract and tort. Nonetheless, it may be asked whether, at the level of general principle, the court has adopted a new and more muscular version of the role to be played by equitable principles in effecting reform in these areas. As I have attempted to demonstrate, of course, support for the view that this has occurred can be drawn from the opinions of the court, both majority and dissenting, in these cases. Again, however, the proof is arguably to be found in the pudding and there is not yet much evidence that equitable compensation will play an overly dramatic role of this kind. Moreover, it is of some significance that in *Canson*, La Forest J., in considering whether to apply principles

84 See part IV, *supra*.

different from those of the common law in imposing liability for equitable compensation, suggested that courts should accord some deference to the principles of common law. Although this view was said to rest upon the fusion of common law and equity,[85] it is evident from La Forest J.'s reasoning in *M. (K.) v. M. (H.)* that it is his view that equity has a continuing traditional role to play in softening the sharp edges of the common law. Although it is true that the dissenting opinion of McLachlin J. in *Canson* offers a more insular and, perhaps, ambitious view of equity's role, she also conceded that the court should "take wisdom where we can find it and accept such insights offered by the law of tort, in particular deceit, as may prove useful."[86] In short, it is possible to read these opinions as support for the view that the court will not lightly use expanded doctrines of equity to set aside common law doctrine without carefully examining its wisdom or, presumably, lack of same.

Finally, we should note that there is little evidence thus far that a majority of the court, at least, has fallen into the trap of what has been referred to above as the *Nocton v. Ashburton (Lord)* problem.[87] That is to say, there is no majority opinion which appears to attempt to reform tort or contract principles through use of fiduciary doctrine with the result that the reform in question is artificially restricted to the fiduciary context. There were two cases — *Hodgkinson* and *Norberg*[88] — in which the dissentients felt that a result favourable to the plaintiff could not be achieved at common law. In each case, however, the majority held that an (arguably) innovative interpretation of the applicable common law rule would achieve this result. Similarly, in *M. (K.) v. M. (H.)*[89] reform of the limitations rules relating to damages for incest or sexual assault were not limited by the majority to cases of fiduciary breach.

In summary, though it is doubtless the case, in my view, that this line of authority contains within it the doctrinal seeds from which a rather unruly version of fiduciary law could grow, a careful reading of these cases that places emphasis on actual results and on the approach to doctrinal modification manifest in these opinions supports a less apocalyptic view.

85 *Sed quaere.* See P. Perell, "The Aftermath of Fusion: *Canson Enterprises Ltd. v. Boughton & Co.*" (1993), 14 Adv. Q. 488.
86 [1991] 3 S.C.R. 534 at pp. 545-56.
87 See *supra*, part V.
88 Both *supra*, footnotes 8 and 19.
89 *Supra*, footnote 25.

Translating this less expansive reading into practical analytical steps, one might suggest the following. Where a court finds the existence of a fiduciary relationship between the parties, the plaintiff will be entitled to strip the defendant fiduciary of profits secured by breach through the traditional remedies of constructive trust and an accounting of profits. Where the plaintiff seeks damages or equitable compensation for fiduciary breach, however, some additional analysis may be appropriate. Where this claim is being pursued in order to avoid an inconvenient rule of the law of contract or tort, it would be appropriate to hold that rule up to scrutiny and examine its underlying wisdom or lack of same. If the current tort or contract rule lacks a sound foundation, a court minded to modify the doctrine could take either one of two steps. First, if the problematic aspect of the rule is of general application (*i.e.*, not restricted to situations in which the parties happen to have a fiduciary relationship), one might, perhaps should, deploy the traditional methods of the common law to effect a modification of the rule of tort or contract in issue. This approach avoids the *Nocton v. Ashburton (Lord)* problem.

If, on the other hand, the problem is one which is quite particular to the fiduciary context, one would deploy the traditional principles of equity to determine whether the imposition of damages relief in equity effects a sound and just result, notwithstanding the fact that a similar result does not obtain in contract or tort. In passing, however, one might suggest that when determining the nature of equitable compensatory relief for breach of fiduciary duty, it is perhaps not entirely obvious why one should invariably ignore such common law concepts as reasonable foreseeability.[90] Surely, the question in such a case is whether the policy considerations giving rise to this limitation in contract and tort should be considered to be present in the particular fiduciary context. In order to accommodate *Guerin*, however, one might add that as the fact situation in issue approaches more closely the factual circumstances of an express trust, the applicable principles of trust law for imposing liability for damages on the express trustee may be appropriately invoked.

An analytical method rather like the foregoing is implicit if not explicit in the reasoning of La Forest J. in *Canson*. It is not deeply inconsistent or perhaps not inconsistent at all with the approach adopted by McLachlin J. in that case or in *Norberg* or *M. (K.) v. M. (H.)* where it was her view that the fiduciary nature of the

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[90] Cf. the dictum of Street J. in *Dawson (Re)* quoted, *supra*, at footnote 76.

relationship should lead to a different approach to remedial questions. By such analytical means, I would suggest, equitable compensation could provide an effective instrument of doctrinal reform without, at the same time, unattractively destabilizing vast areas of contract and tort.

VII. CONCLUSION

The reader who is unfamiliar with this recent line of authorities is likely to find them impressive, but at the same time perhaps, a bit unsettling. Cumulatively, the opinions rendered in these cases offer an extraordinarily rich analytical resource. At every turn, it seems, one is plunged into sophisticated analysis of important and often fundamental issues. At the same time, the cumulative effect appears to be one of introducing a degree of instability into the analysis of fiduciary issues. One can certainly make the case for a prometheus unbound thesis. It is indeed possible that judges working with these materials could further develop equitable compensation for breach of fiduciary duty as a device which would eclipse contract and tort in a variety of commercial settings. I have tried to suggest, however, that a more cautious approach is both desirable and consistent with the views taken by the majority of the court on most occasions. With respect to the definition of fiduciary obligation, I have suggested that the views of the *Hodgkinson* plurality and the *Lac* majority, though they are differently composed, are not only very similar in principle but quite orthodox in their rendering of the fiduciary concept. The discussions of equitable compensation, of course, harbour greater potential for dramatic reform. At this stage, however, it should be noted that apart from *Guerin*, which might be viewed as *sui generis*, the majority of the court in each of the leading cases has adopted the view that the result achieved was not dependent on resort to equitable compensation doctrine. However, in at least three of those cases — *Norberg, M. (K.) v. M. (H.)* and *Hodgkinson* itself — this result was achieved only by effecting what would appear to be a modification of the prior common law doctrine in the direction favoured by those who sought to rely on equitable principles.

While it thus remains unclear whether fiduciary duty, and more particularly, equitable compensation will become an explicit and powerful vehicle for the reform of common law doctrine, it seems rather likely that each will have a continuing covert, and, one hopes, beneficial influence.